

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 22, 2008 Session

BOBBY HAROLD LITTLE, JR. v. CITY OF PORTLAND, TENNESSEE

**Direct Appeal from the Chancery Court for Sumner County
Nos. 2007C-131 and 2007C-132 Tom E. Gray, Chancellor**

**No. M2008-00392-WC-R3-WC - Mailed - January 12, 2009
Filed - February 12, 2009**

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. Employee sustained a compensable injury to both of his shoulders in March 2005. The treating physician assigned 6% permanent anatomical impairment to the body as a whole. Employee suffered a second injury to his shoulders in February 2006. The same physician assigned an impairment of 7% to the body as a whole, which he described as a "cumulative" impairment for both injuries. Employee returned to work for Employer at wage equal to or greater than his pre-injury wage. The trial court awarded 9% permanent partial disability to the body as a whole for the first injury, and 10.5% permanent partial disability for the second injury. Employer has appealed, contending that the trial court incorrectly interpreted the medical testimony. We agree, and modify the judgment accordingly. Employee contends that the trial court erred by denying, on the basis of sovereign immunity, his motion for discretionary costs. We affirm the trial court's ruling on this issue.

Tenn. Code Ann. § 50-6-225(e) (Supp. 2007) Appeal as of Right; Judgment of the Chancery Court Modified

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J. and ALLEN W. WALLACE, SR. J., joined.

Derrick A. Free, Nashville, Tennessee, for the appellant, City of Portland

Thomas J. Martin, Jr., Gallatin, Tennessee, for the appellee, Bobby Harold Little, Jr.

MEMORANDUM OPINION

Factual and Procedural Background

Bobby Little, Jr. (“Employee”) was a policeman for the City of Portland (“Employer”). In August 2004, he injured his right shoulder while restraining an individual. In March 2005, he injured his left shoulder, and aggravated his right shoulder injury, as a result of a similar incident. It is undisputed that these injuries were compensable under the workers’ compensation law. He reported the injuries, and was referred to Dr. Michael Reid, an orthopaedic surgeon. Dr. Reid diagnosed labral tears and possible rotator cuff tears of both shoulders. Dr. Reid performed a surgical repair of Employee’s left shoulder in April 2005. During that procedure, it was determined that Employee did not have a rotator cuff tear. A surgical repair of the right shoulder was carried out in August 2005. As with the left shoulder, Dr. Reid concluded that the primary injury on the right was to the labrum. Both surgeries were of the arthroscopic, rather than open, type.

Employee returned to work in December 2005. In February 2006, he re-injured both shoulders in an altercation with a suspect. He returned to Dr. Reid, who ordered new MRI scans. These showed rotator cuff tears in both shoulders. Dr. Reid performed an open surgical repair of the right shoulder in April 2006. A similar operation was carried out on the left shoulder in September 2006. Employee returned to regular duty in June 2007.

Employee filed separate suits concerning the March 2005 and February 2006 injuries. The cases were consolidated for trial. Dr. Reid testified by deposition. In December 2005, he had assigned Employee 5% anatomical impairment to each upper extremity for the March 2005 injury. This converted to a total of 6% to the body as a whole. Dr. Reid testified that the AMA Guides “were not very helpful in rating [the] particular combination of injuries” sustained by Employee in March 2005. As a result, he characterized his assessment as “somewhat [arbitrary].”

In March 2007, Employee’s left shoulder reached MMI from the February 2006 injury. At that time, Dr. Reid performed a second impairment assessment. Based upon range of motion measurements, Dr. Reid assigned 4% impairment to the upper extremity, or 2% impairment to the body as a whole, for that injury. In April 2007, using the same method, he assigned 8% to the right upper extremity, or 5% to the body as a whole, for the right shoulder. Employee’s combined impairment was 7% to the body as a whole. Dr. Reid stated that the second rating was “a cumulative impairment for what he was at that day as a result of both of them. When I say both of them, I mean the first two original surgeries now combined with the latter two.” On cross-examination, he elaborated by stating that “I actually felt more comfortable with [the second] rating simply because I didn’t have to talk about anything being arbitrary.” He was also asked “[Is] it fair to say in your expert medical opinion that you felt that on April 24, 2007, [Employee] had a total impairment rating of 7 percent to the body as a whole?” His response was “Yes.”

On the date of trial, Employee had returned to work for Employer, and was earning a wage equal to or greater than his pre-injury wage. The parties agreed that any award of permanent partial disability (“PPD”) was capped at one and one-half times the impairment by operation of Tennessee Code Annotated section 50-6-241(d).

The trial court found that Employee had sustained a 6% impairment, and awarded 9% PPD to the body as a whole for the March 2005 injury. It found that he had sustained a 7% impairment and awarded 10.5% PPD for the February 2006 injury. The trial court thereafter denied Employee's motion to recover the cost of Dr. Reid's evidentiary deposition as a discretionary cost under Rule 54.04 of the Tennessee Rules of Civil Procedure.

Employer has appealed, contending that the trial court based its award for Employee's second injury upon an incorrect impairment rating. Employee has raised a second issue, contending that the trial court erred by denying his motion for discretionary costs.

Standard of Review

Courts reviewing an award of workers' compensation benefits must conduct an in-depth examination of the trial court's factual findings and conclusions. *Wilhelm v. Krogers*, 235 S.W.3d 122, 126 (Tenn. 2007). When conducting this examination, Tenn. Code Ann. § 50-6-225(e)(2) requires the reviewing court to "[r]eview . . . the trial court's findings of fact . . . de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." The reviewing court must also give considerable deference to the trial court's findings regarding the credibility of the live witnesses and to the trial court's assessment of the weight that should be given to their testimony. *Tryon v. Saturn Corp.*, 254 S.W.3d 321, 327, (Tenn. 2008); *Whirlpool Corp. v. Nakhoneinh*, 69 S.W.3d 164, 167 (Tenn. 2002). However, the reviewing courts need not give similar deference to a trial court's findings based upon documentary evidence such as depositions, *Orrick v. Bestway Trucking, Inc.*, 184 S.W.3d 211, 216 (Tenn. 2006); *Bohanan v. City of Knoxville*, 136 S.W.3d 621, 624 (Tenn. 2004), or to a trial court's conclusions of law, *Perrin v. Gaylord Entm't Co.*, 120 S.W.3d 823, 826 (Tenn. 2003).

Analysis

Impairment Rating

Dr. Reid's testimony is the only evidence in the record concerning impairment. The trial court concluded that the 7% impairment assigned by him after the second set of surgeries was in addition to the previous 6% impairment. Employer contends that this conclusion was incorrect. In support of its position, Employer cites those portions of Dr. Reid's testimony, set out above, which state that his later impairment rating was "cumulative," and that his initial rating, made before the second injury, was arbitrary.

Employee asserts that the trial court correctly interpreted the medical testimony. He points out that the March 2005 and February 2006 injuries involved different structures within the shoulder joint. He also refers to Dr. Reid's testimony that he based his initial rating on the possibility that Employee would ultimately develop post-traumatic arthritis as a result of his bilateral labral injuries. The second rating was based upon range-of-motion measurements. Employee argues that the potential for arthritis to develop has not lessened. However, as Employer notes, Dr. Reid testified that he did not observe any arthritic changes in Employee's shoulders during the second surgeries.

Dr. Reid testified by deposition, and we are therefore able to draw our own conclusions regarding the weight of that testimony. *Bohanan*, 136 S.W.3d at 624. We note that Dr. Reid stated that, because the AMA Guides did not explicitly address the type of injury sustained by Employee in March 2005, he considered his December 2005 impairment rating to be “arbitrary,” and that he “did not feel comfortable” with the rating. In addition, he testified that he was “more comfortable” with the impairments assigned in March and April 2007, because these were taken directly from the AMA Guides. More significantly, Dr. Reid testified that the latter ratings were “cumulative,” included the effects of “the first two surgeries now combined with the latter two,” and agreed that Employee “had a total impairment rating of 7 percent” as of April 2007. Our examination of this evidence leads us to the conclusion that the trial court erred in its finding that Employee sustained an additional impairment of 7% to the body as a whole as a result of the February 2006 injury. The sum of Dr. Reid’s testimony is that he was uncertain about the impairment which he initially assigned to Employee; was quite certain about the impairment which he assigned after the second injury; and that the later impairment was inclusive of both injuries. Therefore, Employee sustained an additional 1% impairment to the body as a whole as a result of the February 2006 injury. The judgment is therefore modified to reflect an award of 1.5% permanent partial disability to the body as a whole as a result of that injury.

Discretionary Costs

The trial court denied Employee’s motion for discretionary costs, based upon *Gooch v. City of Murfreesboro*, No. M2006-1264-WC-R3-WC, 2007 Tenn. Lexis 1079 (Tenn. Workers’ Comp. Panel Dec. 13, 2007). In that case, a previous Special Workers’ Compensation Appeals Panel determined discretionary costs were not recoverable against municipalities because neither Rule 54, Tenn. R. Civ. P, nor the workers’ compensation statute contain a waiver of sovereign immunity for these costs. A motion for review was filed, and denied by the Supreme Court. We consider *Gooch* to be controlling, and therefore affirm the trial court’s decision on this issue.

CONCLUSION

The judgment is modified to award 1.5% permanent partial disability to the body as a whole for the injury of February 2006. It is affirmed in all other respects. Costs are taxed to the appellee, Bobby Little, for which execution may issue if necessary.

JON KERRY BLACKWOOD, SENIOR JUDGE

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SEPTEMBER 22, 2008 SESSION

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appeals to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by the Appellee, Bobby Little, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM